No. 11732

In the United States Circuit Court of Appeals for the Ninth Circuit

J. W. MALONEY, Collector of Internal Revenue for the District of Oregon,

Appellant,

v.

R. C. GLOVER, M. C. FINDLEY and TINKHAM GILBERT, Trustees under the Will of Sarah E. Carrier, Deceased,

Appellees.

On Appeal from the District Court of the United States for the District of Oregon

Brief for the Appellant

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OPINION BELOW

The District Court rendered no formal opinion. It entered findings of fact and conclusions of law (R. 18-24) which are not reported.

JURISDICTION

This appeal involves claims for refund of income tax for the taxable years 1940 to 1942, inclusive, in the total amount

of $10,557.49. (R. 24-26.) A claim for refund for each of the taxable years was filed within three years after the filing of the returns for those years (See Exhibits 1-5, inclusive, and 7)[1] in accordance with the requirements of Section 322(b)(1) of the Internal Revenue Code. The claims for refund were disallowed by the Commissioner by registered letters mailed to appellees on April 15, 1946, and August 29, 1946. (R. 22.) Suit was filed in the District Court May 20, 1946 (R. 35), in conformity with Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under Section 24, Fifth, of the Judicial Code. The judgment of the District Court was entered March 4, 1947. (R. 24-26.) Notice of appeal was filed on May 29, 1947 (R. 26-27), conformably to the provisions of Section 128(a) of the Judicial Code, as amended, upon which the jurisdiction of this Court rests.

QUESTION PRESENTED

Whether 15/20ths of the income received by the administratrices during the course of the administration of the estate of Sarah E. Carrier, deceased, is exempt from income taxation under Section 162(a) of the Internal Revenue Code as income which was permanently set aside for charitable,

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1 Pursuant to agreement of the parties (R. 70), the exhibits introduced in evidence (See R. 44-46) have been filed and docketed with this Court in their original form and are not contained in the printed record.

etc., purposes under the last will and testament of the decedent.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 161. IMPOSITION OF TAX.

(a) Application of Tax.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—* * *

(b) Computation and Payment.—The tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary, * * *
(26 U.S.C. 1940 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for * * *;

* * *

(26 U.S.C. 1940 ed., Sec. 162.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.162-1. *Income of estates and trusts.*—In ascertaining the tax liability of the estate of a deceased person or of a trust, there is deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. * * *
>
> From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:
>
> (1) Any part of the gross income of the estate or trust for its taxable year which, by the terms of the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162(a). This deduction is in lieu of that authorized by section 23(o) in the case of individual taxpayers.
>
> * * *

Treasury Regulations 111, Section 19.162-1, is identical.

STATEMENT

The findings of fact of the District Court (R. 19-22), taken principally from admitted facts (R. 10-12), are as follows:

Sarah E. Carrier, hereinafter called the "decedent," died

on January 27, 1940. (R. 19.) In her last will and testament she provided for certain specific bequests and in paragraph Fourteenth devised and bequeathed the residue of her estate to designated charitable, religious and educational organizations as follows (R. 19-20): 5/20ths directly to designated charitable, religious and educational organizations and the remaining 15/20ths to appellees herein as trustees upon the following terms (R. 20):

> * * * to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions, (naming them).

The organizations named in the above-quoted paragraph

are charitable and religious organizations within the purview of Sections 23(o) and 162(a) of the Internal Revenue Code. (R. 12, 22.)

The estate of the decedent remained in the process of administration until March 30, 1943, during which time no payments were made to relatives under paragraph Fourteenth of the decedent's will. (R. 21.) On March 30, 1943, the administratrices transferred 15/20ths of the residue of the estate to appellees as trustees, in accordance with the provisions of paragraph Fourteenth of the will. (R. 11, 21.)

During the period when the estate was in the process of administration, the administratrices filed income tax returns for the estate, reporting and paying tax on net income of $25,356.42 for the period from January 27, 1940, through December 31, 1940; $21,784.04 for the calendar year 1941; and $24,592.67 for the calendar year 1942. (R. 21.) None of this income was from the sale of capital assets. (R. 11.)

The Collector voluntarily refunded the tax on 5/20ths of the income for each of these periods and claims for refund of the remaining 15/20ths of the tax for each year were subsequently filed by appellees. (R. 22.) The claims for refund, which were disallowed (R. 22), were based on assertions that the entire income of the estate was accumulated during the taxable periods and became a part of the residue bequeathed to charitable, etc., organizations under

paragraph Fourteenth of the decedent's will and that, therefore, the income was deductible as having been permanently set aside during the taxable periods for the purposes specified in Section 23(o) of the Internal Revenue Code (See Exhibits 4-7, inclusive).

The gross income, expenses and amounts paid to indigent relatives since the establishment of the trust on March 30, 1943, after the taxable periods involved here, were as follows (R. 22):

Period	Gross Income*	Expenses	Payments
3/31/43 to 12/31/43	$21,536.02	$2,100.00	$ 675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Totals.....	$93,452.01	$6,744.12	$6,075.00

*Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.

On the basis of these facts, the District Court held that the income received by the administratrices during the course of the administration of the estate was, pursuant to the terms of the decedent's will, permanently set aside for the purposes and in the manner specified in Section 23(o) of the Internal Revenue Code and therefore is exempt from taxation under Section 162(a) of the Code. (R. 23.)

STATEMENT OF POINTS TO BE URGED

The statement of points upon which we intended to rely is set forth in the Record at pages 31-32. (See also, R. 68-69.) Points III and IV may be ignored. They refer to findings of fact of the District Court which were contained in the copy we received of the findings of fact and conclusions of law of the District Court but are crossed out in the copy contained in the typewritten transcript of record and are omitted from the printed record, having apparently been deleted by the District Court before signature. Briefly, we contend that the District Court erred in holding that 15/20ths of the income received by the administratrices of the estate of Sarah E. Carrier, deceased, during the course of administration of the estate was, pursuant to the terms of the will of the testatrix, permanently set aside for charitable, etc., purposes and therefore exempt from income taxation under Section 162(a) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

Section 162(a) of the Internal Revenue Code exempts from tax income which, pursuant to the will or deed creating the trust, is permanently set aside for charitable, etc., purposes. In paragraph Fourteenth of her will, Sarah E. Carrier, deceased, devised and bequeathed 15/20ths of the residue of her estate in trust for a period of ten years after

her decease, with directions to devote the income therefrom to the care and maintenance of needy blood relatives of herself and husband, no farther removed than first cousins, and, at the end of the ten-year trust term, to transfer the corpus and accumulated income to named organizations which are admittedly charitable and religious organizations within the coverage of Section 162(a). The District Court held that the income received by the administratrices during the course of the administration of the estate and prior to establishment of this trust was permanently set aside for charitable, etc., purposes and therefore exempt from tax under Section 162(a). This holding is sustainable only on the theory that the income received by the administratrices during the course of the administration of the estate became a part of the corpus of the trust subsequently established, since only the corpus of the trust, which was to be kept intact during the trust period, was permanently set aside for charitable, etc., purposes. If the income received by the administratrices remained income available to the trustees for distribution as such to needy relatives of the testatrix, the income was subject to noncharitable uses and therefore not permanently set aside for charitable uses.

It is the law in Oregon, the State in which this trust was administered, that, unless otherwise provided in the testator's will, the income beneficiaries of a testamentary trust are entitled to income from the date of the testator's death. In

the case of a testamentary trust of the residuary estate, as here, it is the income from the residue as subsequently ascertained which is distributable retroactively by the trustees as income. This includes income received during the course of the administration of the estate provided that, as in the present case, the income received during the course of the administration of the estate was derived from property which later passed to the trustees as residue of the estate. This rule that the income received during the administration of an estate remains income available for disposition as income under the terms of the testamentary trust, instead of becoming a part of the corpus of the trust, is one which attempts to effectuate the testator's intent and which, in accordance with the testator's presumed or apparent intent, treats a testamentary trust as if it had been set up immediately upon the testator's death, with a corpus of residue to be subsequently ascertained.

There can be no doubt that the instant testatrix intended that the income received by the administratrices during the course of the administration of the estate should remain income available for payments to needy relatives, rather than to become part of the trust corpus. In paragraph Fourteenth of her will she provided for a trust term of *ten years after her decease* and it was the income during that period, which of course includes the period when the estate was in the

process of administration, which was to be distributable to needy relatives.

It is immaterial whether payments could have been made to needy relatives during the course of the administration of the estate. Section 162(a) allows a deduction only of income *permanently* set aside for charitable, etc., purposes *during the taxable year* and the income received by the administratrices was, during the taxable years, subject to future use by the trustees, and probably also to present application under court order, for payments to needy relatives. The income received by the administratrices also remained subject to use for payments to needy relatives up until the expiration of the ten-year trust term, for the testatrix merely provided that at the end of the ten-year period the accumulated income and corpus were to be transferred to the designated charities. She did not provide that unused annual income should be added to corpus.

It is also immaterial that the income of the trust may have been greatly in excess of the claims or needs of relatives. The income of the taxable years was subject to use for payments to needy relatives and the possibility that some or all of it would be so used was not so remote as to be negligible. Under such circumstances the income was not permanently set aside for charitable, etc., purposes during the taxable years and appellees are not entitled to the deduction the District Court has allowed them.

ARGUMENT

The income in question was not permanently set aside for charitable, etc., purposes under the last will and testament of Sarah E. Carrier, deceased, and therefore is not exempt from income taxation under section 162(a) of the Internal Revenue Code.

In paragraph Fourteenth of her will, Sarah E. Carrier, deceased, devised and bequeathed 15/20ths of the residue and remainder of her estate to appellees as trustees for a period of ten years after her decease, with directions to devote the income therefrom to the care and maintenance of needy blood relatives of herself and her husband, not farther removed than first cousins, and, at the end of the ten-year trust period, to transfer the corpus and any accumulated interest and income derived therefrom to named organizations which are admittedly charitable and religious organizations within the coverage of Section 162(a) of the Internal Revenue Code, *supra.* From January 27, 1940, when the testatrix died, to December 31, 1942, during which period the estate of the testatrix was in the process of administration and the trust had not been established, the administratrices received income which appellees contend and the District Court has held is exempt from income taxation under Section 162(a) of the Internal Revenue Code as having been permanently set aside for charitable, etc., purposes by virtue of the above-stated provisions of

paragraph Fourteenth of the testatrix's will. The District Court did not state the reason or reasons for its holding, but from any point of view the holding is, we submit, clearly erroneous.

The deduction allowed by Section 162(a) is of income which "pursuant to the terms of the will or deed creating the trust," is during the taxable year paid or permanently set aside for charitable, etc., purposes. The terms of the will of the testatrix therefore control in determining the status of income asserted to be exempt from tax under the statute, irrespective of what was actually done with the income. *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner,* 126 F. 2d 48, 52 (C.C.A. 9th); *Commissioner* v. *Citizens & So. Nat. Bank,* 147 F. 2d 977, 980-981 (C.C.A. 5th); *Charles P. Moorman Home for Women* v. *United States,* 42 F. 2d 257 (W.D. Ky.); cf. *Ithaca Trust Co.* v. *United States,* 279 U. S. 151. Accordingly, the purpose for which the income involved in the present case was actually used is immaterial *(Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra),* as is also the manner in which the income was treated on the books of the administratrices and trustees *(Charles P. Moorman Home for Women* v. *United States, supra).*[2]

2. Tinkham Gilbert, one of the trustee-appellees herein, testified that the cash received from the administratrices was set up as part of the corpus of the estate on the trustees' books. (R. 58.) It may also be that some of the income of the estate was used to pay debts and legacies, for the trustees received some $42,000 in cash from the administratrices (R. 51, 58), whereas the total net income reported for the taxable periods by the administratrices was $71,733.13 (R. 21).

In addition, to meet the requirements of Section 162(a), the income received by the administratrices of the testatrix's estate must be income which, pursuant to the will of the testatrix, is "permanently" set aside, or is to be used "exclusively", for charitable, etc., purposes. It is well established that income is not permanently set aside for charitable, etc., purposes within the meaning of Section 162(a) if under the will, there is a possibility of use of the income for other than a charitable, etc., purpose, at least when the possibility of use for another purpose is not so remote as to be negligible. *Merchants Bank* v. *Commissioner,* 320 U. S. 256, 263; *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra; Langenbach's Estate* v. *Commissioner,* 134 F. 2d 590 (C.C.A. 6th); *Commissioner* v. *Upjohn's Estate,* 124 F. 2d 73 (C.C.A. 6th); *Commissioner* v. *F. G. Bonfils Trust,* 115 F. 2d 788 (C.C.A. 10th); *Boston Safe Deposit & T. Co.* v. *Commissioner,* 66 F. 2d 179 (C.C.A. 1st), certiorari denied, 290 U. S. 700; *Charles P. Moorman Home for Women* v. *United States, supra; Holcombe* v. *United States,* 41 F. Supp. 471 (Mass.); *Colt* v. *Duggan,* 25 F. Supp. 268 (S.D.N.Y.).

In the present case 15/20ths of the income received by the administratrices was subject to other than charitable, etc., uses unless, by the terms of the testatrix's will, that income passed to the trustees from the administratrices as a part of the *corpus* of the trust for which provision was made in

paragraph Fourteenth of the will. The testatrix did not direct that the income from 15/20ths of the residue of her estate be set aside for charitable, etc., organizations. On the contrary, she directed that the income from 15/20ths of the residue of her estate be devoted to the care and maintenance of blood relatives of herself and her husband, no farther removed than first cousins, who should be in need of financial assistance and it was only the income which was not used for such a purpose and was "not otherwise disposed of under the authority herein conferred" which was to be transferred to charitable, etc., organizations, along with the corpus of the trust, at the expiration of the ten-year trust period. (R. 20.) The testatrix also evidently intended that all expenses of the administration of the trust should be paid from the income of 15/20ths of her residuary estate, for she stated that it was her "direction that the corpus of said trust fund be kept intact." (R. 20.) Only the corpus of the trust, which was to be kept intact by the trustees and transferred to designated charitable, etc., organizations at the end of the ten-year trust period, was dedicated exclusively to and permanently set aside for charitable, etc., purposes. If the income involved here—that received by the administratrices during the course of the administration of the estate prior to the establishment of the trust—remained income when and if transferred to the trustees after the taxable years, and thus did not become part of the corpus

of the trust, that income could be used for the financial assistance of needy relatives of testatrix and her husband and, accordingly, was not permanently set aside for charitable, etc., purposes or to be used exclusively for such purposes.

As this Court stated in *Commissioner* v. *Bishop Trust Co.,* 136 F. 2d 390, 391:

> Whether the money here in question was received by the trustee as income or as corpus depends upon the effect of the language of the will under the law of the jurisdiction in which the estate is administered. * * *

Here, the testatrix's estate was administered in the State of Oregon (See Exhibit 11) and, accordingly, Oregon law is controlling.

The law of Oregon in this connection is clear. In *Kinney* v. *Uglow,* 163 Or. 539, the testator, Abel Uglow, provided in his will that, as soon as his estate was administered upon, the whole of his estate exclusive of a bequest made to his wife, should be turned over to a trustee who was directed to make specified monthly payments to members of the testator's family. The executor received income during the administration of the estate and before the trust was created and, upon completion of the administration of the estate but before the trustee was appointed, made distributions of the income to the beneficiaries of the trust in amounts which

covered monthly payments for prior months. The question was whether the executor should have turned over this money to the trust instead of paying it out to the beneficiaries. The court held that the income was properly paid out to the beneficiaries, stating (pp. 553-555):

> The general rule is well established that when property is devised or bequeathed in trust to pay the income therefrom to a beneficiary for life or for a limited time, such beneficiary is entitled to payment of the income *from the death of the testator,* unless otherwise provided in the will: * * *
>
> The reason for the above rule, as often expressed, is that the life tenant ranks first in the consideration of the testator, and a contrary construction would take from him a part of his income and add it to the corpus of the estate, thereby at the expense of the life tenant increasing the estate of the remaindermen.
>
> * * *
>
> The fact that the testator devised and bequeathed the residue of his estate to John C. Uglow as trustee, with direction to him to pay the income therefrom to designated beneficiaries, does not alter the general rule hereinabove stated that such income shall accrue to the beneficiaries *as of the date of the testator's death,* rather than the date of the delivery of his estate to the trustee: * * *. [Italics supplied.]

The general rule stated and applied by the court in this case was reiterated in *In re Feehely's Estate,* 170 P. 2d 757 (Or. 1946), and stated to apply in that case. The rule is

one which is applicable in numerous jurisdictions (see, e. g., *Hale* v. *Anglim,* 140 F. 2d 235 (C.C.A. 9th); *Commissioner* v. *Bishop Trust Co., supra; Harrison* v. *Commissioner,* 119 F. 2d 963 (C.C.A. 7th); 1 (Restatement of the Law, Trusts, Sec. 234) and which, as in Oregon (*Kinney* v. *Uglow, supra*), applies when the testamentary trust consists of the testator's residuary estate (See 70 A.L.R. 637-644, note; 158 A.L.R. 443-447, note). Under the rule, the trustee should not add income received by the executor to the corpus of the trust. 4 Bogert, Trusts and Trustees, Sec. 811, p. 2342.

In re Feehely's Estate, supra, may at first blush appear to be, but is not, in conflict with the rule as stated in *Kinney* v. *Uglow, supra.* In *In re Feehely's Estate,* also decided by the Supreme Court of Oregon, the testator made specific bequests of all of her assets, except a parcel of real property, and devised and bequeathed the residue of her estate (consisting of the parcel of real property) in trust with directions to the trustees to pay the income therefrom for the support, maintenance and education of her daughter Suzanne. The parcel of real property, which was income producing property, produced $5,000 in income during the administration of the estate before the payment of claims against the estate. The question was whether the property should be sold in order to obtain money to pay the claims against the estate or whether the $5,000 in income could be used for that purpose. It was held that the $5,000 con-

stituted a part of the residue of the testator's estate and was available for payment of the claims but this holding resulted from the fact that, as the court pointed out, most of the $5,000 was earned by assets which would not have remained a part of the residue of the estate had those assets (that is, the income producing property) been sold promptly to provide money with which to pay the claims against the estate. That the court did not intend to depart from the rule stated in *Kinney* v. *Uglow, supra,* is uncontravertible in view of the fact that the rule was quoted from *Kinney* v. *Uglow,* and stated to apply. The explanation for the result reached is that under the rule it is the income from the residue *as subsequently ascertained* which is available for distribution as income under the terms of the trust (*Commissioner* v. *Bishop Trust Co., supra;* 158 A.L.R. 443, note) and in *In re Feehely's Estate, supra,* the income involved was from property which would not have been residue of the estate, and thus not corpus of the trust, if the income had not been held to be available for payment of claims. The choice in that case was as between the adoption of the so-called "Massachusetts" rule and the general rule as to income from *property of the estate sold to pay debts, claims, etc.* In adopting the general rule and holding that such income becomes a part of the residue of the estate, the decision applies the rule that the income received by the executor from the residue as *subsequently ascertained* is dis-

tributable by the trustees as income in accordance with the terms of the trust.

The rule that the income from the residue as subsequently ascertained remains income distributable as such by the trustees and does not become a part of the trust corpus may apply even though in distributing the trust income trustees are required to exercise a discretion based upon a specified external standard, as in the present case, and are not, as in the usual case applying the rule, merely directed to pay the income to a designated person or persons for life or for a stated term of years. In *In re Feehely's Estate, supra,* where the Supreme Court of Oregon stated that the rule applied, trust income was to be paid for the support, maintenance and education of the testatrix's daughter and any income not needed for those purposes was, in the discretion of the trustee, to be accumulated and held for the account of the daughter. In *Hewitt* v. *Hicock,* 96 Conn. 176, one of the cases which the Oregon Supreme Court cited in *Kinney* v. *Uglow, supra,* as authority for the rule (p. 554), it was stated (96 Conn. at pp. 179-180):

> In the cases cited, the right of the life tenant to receive the income from the trustees was absolute. In this case it is not. During the minority of any beneficiary the trustees are to expend such portion of the income as may seem necessary to provide such beneficiary with a comfortable support and to enable him or her to secure a good education. After any beneficiary becomes

of age, he or she is not entitled to receive his or her share of the income absolutely, unless it appears to the trustees that such beneficiary is capable of managing and applying it. And any portion of the income not used in any year is to become a part of the principal.

The claim made on behalf of the possible remaindermen is that in consequence of these conditions in the will, and because the trustees did not qualify until May 17th, 1920, all of the interest accrued up to that date had become "income unused in any year" and must be added to principal.

With this contention we do not agree. * * *

The cases cited, and the manifest intention of the testatrix, required us to hold that the fund in question had not lost its character as income when it came into the hands of the trustees in 1920, * * * *On this branch of the case our conclusion is that the trustees are required to treat the fund as income in their hands, and to deal with it as part of the income of the first fiscal year of the trust.* [Italics supplied.]

As indicated in *Hewitt* v. *Hicock, supra,* the rule stems from an attempt to effectuate the presumed or apparent intent of the testator. This the Supreme Court of Oregon recognized when, in applying the rule in *Kinney* v. *Uglow, supra,* it stated (p. 553):

In construing wills the first duty of the court is to ascertain, if possible, the intention of the testator. Taking the present will in its entirety, it is evident that Abel Uglow intended that the provisions thereof as to payment of income from the estate to the beneficiaries

> named should be effective as of the date of his death and not the date of delivery of the estate to the trustee. * * * *There is no indication in the will that the income received by the executor shall become a part of the corpus of the trust estate,* except that such surplus as may remain after paying the allowances provided in paragraph IV of the will is to be added to the trust estate. [Italics supplied.]

There can be little, if any, doubt that in the present case the testatrix intended that 15/20ths of the income received by the administratrices from her residuary estate was to remain income, available for payments to needy blood relatives, rather than to become part of the corpus of the trust set aside for named charitable, etc., organizations. In paragraph Fourteenth of her will the testatrix stated that 15/20ths of the residue of her estate was to be held by appellees in trust "for ten years *after my decease*" [italics supplied] and provided for disposition of the corpus and accumulated income "upon the expiration of said trust period of ten years after my decease." (R. 20.) Obviously, therefore, she assumed that the trust would be set up immediately upon her death and intended that the income from 15/20ths of her residuary estate should be available for disposition as income to needy relatives for a period *beginning at her death* and ending ten years later. Indeed, only by considering the income received by the *administratrices* as income distributable to needy relatives could the income

from 15/20ths of the testatrix's residuary estate be distributed as income for a ten-year period. Plainly, therefore, as in *Commissioner* v. *Bishop Trust Co., supra,* p. 391, decided by this Court, "the trustee was entitled to income from the date of the testator's death."

The income to which the trustees were entitled as income available for distribution to needy relatives included all of the income received by the administratrices during the taxable period involved here, when the estate was in the process of administration. R. C. Glover, who handled the probate of the estate and, as one of the trustees, is an appellee in this case (R. 49), testified before the District Court as follows (R. 51):

> A. When the estate was closed—there was nothing disposed of during the course of administration in the way of property. There was an accumulation, as I recall, of something like $42,000 of funds.
>
> All of the assets, as listed in the inventory and appraisement, except some personal property that was sold under authority of the Court and report made, such as personal effects and furnishings and things of that character, were all turned over to the Trust, * * *

Hence, all of the income received by the administratrices during their administration of the estate must have been income from property the administratrices subsequently turned over to the trustees as residue of the estate and which,

as such, became the corpus of the trust. In any event, appellees, who were the plaintiffs in the District Court seeking a refund of tax, failed to prove that any part of the net income during the taxable period was derived from property which did not constitute residue turned over to the trustees.

Contrary to the contention appellees made in the District Court (See R. 12, 40), it is immaterial whether any of this income could have been paid to needy relatives during the course of the administration of the estate and prior to establishment of the trust. Actually, it would appear that claims of needy relatives would have been allowed by a state court during the administration of the estate if any such claims had been pressed, so long as it appeared that the administrators had on hand income which would later pass to the trustees as income.[3] See *Kinney* v. *Uglow, supra; Reid* v. *Dodge,* 44 App. D. C. 558. But even if none of the income received by the administratrices could have been paid out to needy relatives during the taxable period, when the testatrix's estate was in the process of administration, the income was nevertheless not permanently set aside during the taxable years as required by Section 162(a), because the

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3 R. C. Glover, one of the appellees, testified that the relatives filed no claims during the course of probate; that during the course of probate a number of them inquired as to their rights; and that they were informally advised that the matter of allocation of any funds to any claimant had to await the formation of the trust. (R. 49-50.)

income was at that time subject to future use by the trustees for payments to needy relatives and thus for noncharitable purposes. See *Charles P. Moorman Home for Women* v. *United States, supra; Commissioner* v. *Upjohn's Estate supra.* In the very first year after the trust was created the trustees could use the income received by the administratrices for payments to relatives. See *Hewitt* v. *Hicock, supra.* Moreover, the income the administratrices received remained subject to use for payments to needy relatives during the entire period of the trust, for the testatrix did not direct that the unused income of any year was to be added to the corpus. Instead, she directed that at the expiration of the trust the corpus and "accumulated interest and income" (R. 20) should be transferred to the designated charities. She must therefore have intended that unused income was to be accumulated as income, as appellees seem to have conceded in the District Court (See R. 39-41), and to give to the charities only that which remained at the expiration of the trust.

Appellees will probably contend, as they did in the District Court (R. 12-13, 40), that, because of the large amount of income earned by the trust, there was no real possibility that the unused income of any given year would be used for other than charitable, etc., purposes. We are, however, here concerned with income received by the administratrices which was subject to later use by the trustees for payments

to needy relatives, not with income which the trustees did not use in any particular year of the trust for payments to needy relatives. There was a very real possibility that the income received by the administractrices during the course of the administration of the estate would be used for payments to needy relatives immediately upon establishment of the trust and certainly at least a possibility that that income, if not used in the first year of the trust, would be used in subsequent years for payments to needy relatives.[4] Whether the income of the taxable years, instead of income subsequently earned, was actually used by the trustees for payments to needy relatives is immaterial. Since the income of the taxable years was during those years subject to at least future use, in the option of the trustees, for payments to needy relatives, the income was not permanently set aside for charitable, etc., purposes during the taxable years. *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner,* 126 F. 2d 48, 51 (C.C.A. 9th). The right to a deduction under Section 162(a) depends upon the effect of the testatrix's will, not on what the trustees choose to do. Appellee's contention in this connection is apparently based upon cases holding that income was permanently set aside for charitable, etc., purposes in situations where, pursuant to the testator's will, the possibility that the income would be used

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4 Tinkham Gilbert, one of the trustee-appellees herein, testified that the trustees had no way of knowing what the relatives might need in the future. (R. 65.)

for other than charitable, etc., purposes was so remote as to be negligible. Obviously, we do not have such a situation here.

CONCLUSION

The decision of the District Court is incorrect and should be reversed.

Respectfully submitted,

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